

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

Rulemaking to Amend Part 1 and Part 21
of the Commission's Rule to Redesignate
the 27.5 - 29.5 GHz Frequency Band and
to Establish Rules and Policies for
Local Multipoint Distribution Service;

92-297

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MAR 16 1993

CC Docket No. 92-297
RM-7872; RM-7722

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS

**THE UNITED STATES INTERACTIVE
AND MICROWAVE TELEVISION
ASSOCIATION**

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March 16, 1993

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Executive Summary

USIMTA applauds many of the Commission's proposals for the efficient introduction of Local Multipoint Distribution Systems ("LMDS") and contends that as the enterprising Suite 12 Group first proposed a use for this sparsely populated frequency, the Commission in its rules should ensure that other entrepreneurial interests have the opportunity to enhance the public interest through subsequent innovation. We contend that the future of American telecommunications is only as bright as the quality and pace of the technological innovation that will pilot it into the twenty-first century. Historically, we submit, it has been America's unique entrepreneurial spirit as exhibited through various small and medium sized entities that has been at the forefront of this advancement. We believe that they will continue to be.

USIMTA sympathizes with the Commission's concerns that an influx of speculative applications would compromise the Commission's efforts to rapidly deploy this service to the public. We submit that implementing spectrum auctions of any type would preclude this entrepreneurial spirit from participating and submit that a system of post card lotteries with subsequent transfer fees would alleviate many of these concerns while preserving the opportunity for the sincere entrepreneur.

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COMMENTS

The United States Interactive and Microwave Television Association ("USIMTA") pursuant to the Commission's rules, hereby submits its comments in response to the *Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration* (the "Notice") released by the Commission on January 8, 1993 in this proceeding.¹ USIMTA applauds many of the Commission's proposals for the efficient introduction of Local Multipoint Distribution Systems ("LMDS"), and contends that as the enterprising Suite 12 Group first proposed a use for this sparsely populated frequency, the Commission in its rules should ensure that other entrepreneurial interests have the opportunity to enhance the public interest through subsequent innovation.

USIMTA recognizes that the Commission faces potentially ominous human and financial processing obligations should a large number of speculative license applications be filed in this docket. We understand that such an influx, as evidenced by the recent MMDS proceeding, could

¹ Amendment of the Commission's Rules to Establish New Local Multipoint Distribution Services [hereinafter cited as "Notice"].

quickly result in a processing backlog and could therefore limit the Commission's capacity to accomplish its primary responsibilities; the efficient public introduction of new technologies, and the fostering of continued technological innovation. Our comments offer suggestions for alleviating these possible burdens.

I. INTRODUCTION AND STATEMENT OF INTEREST

The United States Interactive and Microwave Television Association is a Washington, DC based trade association that represents the interests of the microwave and interactive television industries. USIMTA's interest in this docket stems from our predominantly entrepreneurial membership, and their desires to supply LMDS to the public. USIMTA's membership includes but is not limited to domestic and international MMDS system operators, MMDS and IVDS license applicants, engineering companies, application preparation firms, equipment vendors, communication attorneys and financing entities.

II. DISCUSSION

A. The LMDS industry requires the proven innovative capabilities of entrepreneurial interests.

concerns include the Commission's human and financial limitations with regard to license application processing, industry regulation and the increasing perception among decision makers that new sources for federal revenue should be sought out and tapped. USIMTA applauds these maxims, but implores the Commission to refrain from taking a well intended but ill-calculated step toward their satisfaction by requesting congressional authority to distribute the nation's electromagnetic spectrum through "public" auctions rather than through the current practice of lotteries. There is a more effective course!

The Commission suggests that the initial applications of this frequency will probably be limited to one way video transmission but it concedes that other applications are likely and that some as of yet may still be outside of the industry's current paradigm. The Commission should note that as the public was once infatuated with broadcast television, it now demands cable, and as it once heralded the introduction of AM radio, its appetite quickly craved the expanded FM services. This underlies what becomes the Commission's most important consideration in this proceeding, how it can most efficiently address the public's changing needs through the development of the potentially dynamic 28 Ghz band. USIMTA submits that to accomplish this task, the Commission needs to adopt rules that will encourage technological innovation at these frequencies.

USIMTA contends that the future of American telecommunications is only as bright as the quality and pace of the technological innovation that will pilot it into the twenty-first century. Historically, we submit, it has been America's unique entrepreneurial spirit as exhibited through various small and medium sized entities that has been at the forefront of this advancement. One

need look no further than the significant technological enrichments offered to the industry by entrepreneurs like The Suite 12 Group, TV Answer, Inc., McGaw Cellular, Inc. and MCI Communications to support this claim. Without their contributions, the Commission would have little need for a LMDS or and IVDS proceeding and in addition, the nation's cellular and land line communications industries almost surely would have advanced less dramatically.

The Commission's challenge is how it can reconcile its worthy goals and practical limitations with the public's perpetual appetite for the levels of innovation historically demonstrated by small and medium sized companies. More simply put, the Commission needs to ensure the rapid introduction of this service to the public, limit the amount of time required for application processing and assist in raising federal revenues, while recognizing the innovative potential of entrepreneurial interests in this field.

B. Spectrum Auctions, in any form, are prohibitive to the entrepreneur.

It is apparent through the Notice of Proposed Rulemaking in Docket 90-314, (PCS Supra)³ and through various public pronouncements, that the Commission shares USIMTA's desire to encourage the entrepreneurial spirit in the telecommunications industry. We agree with the Commission, however, that if lotteries are to be employed to ensure this opportunity, the process needs to be reformed so as to discourage the speculation which might result in the delay of licensing, construction and service. It is USIMTA's position that lotteries per se do not foster this speculation, rather it is encouraged by the rules associated with the process. "Where entry

³ Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 5676 (1992).

requirements have been high and the prospects for a quick profit low, speculative applications have not been a major problem."⁴ The challenge lies in the construction of a new scheme that would at once retain all of the benefits of the lottery system while erecting safeguards to deter potential speculative filings.

Appendix E of the Commission's PCS Notice⁵ attempted this reconciliation through the proposals of two reformed auction plans, one that would spread the successful bidder's payment obligation over a period of 3 years, and one that would include an initial fee with subsequent royalty payments. In each of these scenarios, the competitive bidder who enters the process with the most substantial financial resources retains that advantage regardless of the modification; it could afford the higher installment payments, upfront fees, or royalty percentages.

A setback inherent in any auction scheme is the reduction of the successful bidder's financial capabilities in the early stages of construction. This blow would be accentuated in the LMDS industry by the strict coverage benchmarks upon which the Commission has tentatively decided. This may cause the winning bidder to forgo the initial costs of acquiring custom equipment best able to deliver these services, by merely upgrading its existing equipment to a level that would guarantee the short term profit required to satisfy its auction debts. The operator would also most likely minimize its research and development expenditures for this same reason. Auction payments, under any plan would necessarily preclude the technological

⁴ *Comments on 2 GHz Licensed PCS* by Express Communications, Inc. at page 7

⁵ *Notice of Proposed Rule Making and Tentative Decision*, PCS Supra, 7 FCC Rcd 5676 (1992).

innovation that could be realized in the absence of such costs. Short term revenue raising must take a back seat to assuring that the American public has access to the most innovative, spectrally efficient [LMDS] offerings available."⁶

C. Transfer Fees should be adopted in lieu of Auctions

USIMTA shares the Commission's view however, that the Electromagnetic spectrum belongs to the general public, and as such, the federal government should be compensated whenever this precious resource is exploited for private profit. USIMTA suggests that the Commission's most effective course for securing such compensation would be to request, from the congress, authority to implement a system of transfer fees similar to that proposed by Express Communications, Inc. in its comments for establishing Personal Communications Services.⁷ This fee would be "calculated as a percentage of the gross sales price, upon each assignment of a [LMDS] license of transfer of control of a [LMDS] license or transfer of control."⁸

The public would therefore receive its compensation only after a profit is realized. This would allow a company's scarce venture capital to be spent on equipment and research. In addition, the public can rest assured that its compensation is not coming at the expense of denying small, innovative companies like Suite 12 the opportunity to enhance the public's standard of living and global position. The latter point is of vital import, as in our era of global

⁶ *Comments on 2 GHz Licensed PCS* by Express Communications, Inc. at page 6.

⁷ *Ibid* at page 15

⁸ *Ibid*

competition, it would be self defeating to preclude any entity, great or small, from contributing to the strategic position of the United States merely because of its financial limitations.

These fees would be subject to the trafficking restrictions imposed by the Commission and would command a greater percentage of the sales price in the early years to further augment the Commission's goal of deterring speculation. In its PCS comments, Express proposed a schedule by which the government would secure 10% of the gross sales price for a system in operation for a single year. It would claim 9% after two years and so on until the government would be entitled to 1% after a decade and would relinquish all claims to a system that is held by a single entity for eleven or more years. Upon each resale of a license, the 'clock' would begin again.⁹

USIMTA shares Express' view that this transfer fee could be substantially higher, (upwards of 25%), if the Commission moved to abolish its trafficking limitations.¹⁰

D. Post Card Lotteries will minimize the Commission's obligations while preserving the spectrum for the sincere entrepreneur.

As we have noted previously in these comments, USIMTA supports the Commission's desire to deter the filing of speculative license applications. We suggest, however, that it is not the lottery process per se which fosters this speculation but rather the rules associated with this process. USIMTA submits that a process involving post card lotteries is the most efficient and equitable road down which the Commission can proceed. This method, complemented by strict entry criteria and trafficking limitations, would at once free the Commission from much of its

⁹ *Ibid* at page 16

¹⁰ *Ibid*

processing obligation, while ensuring that the tentative selectee intended and was competent to construct a system that would provide service to the public in a timely manner.

Market specific post cards would be submitted as applications to the Commission during a twenty-four hour filing window, and all such post cards would be accepted for the initial lottery. In addition to personal information, each applicant would need to certify, under penalty of perjury, that it had secured firm financial backing and had established the necessary engineering and business plans with which to develop the market applied for.

USIMTA suggests that instead of requiring a market specific firm financial commitment for every market filed, the Commission require an applicant to produce a single commitment to verify that it has secured the required funds to build and operate a system of a period of one year. USIMTA contends that there will be entities filing in multiple markets and it would be unreasonable to expect these entities to secure specific financial backing for every market filed. USIMTA submits that this scheme will ensure that small, innovative entities will have the same opportunity to serve the public interest as the larger companies for whom market specific firm financial backing is less an obstacle. USIMTA suggests that under this scenario, should an entity win more than one market, it should have a period of 30 days within which to produce the subsequent commitments.

From this application pool, a tentative selectee would be chosen. USIMTA recommends discontinuing the practice of choosing a contingent winner as that entity has the immediate incentive to delay the awarding of the license and subsequent commencement of the construction

period. Once a tentative selectee is chosen, that applicant would have a period of forty-eight hours with which to comply with a number of strict, pre-determined requirements. These responsibilities would include the submission the afore mentioned assurances and plans. It is expected that serious applicants would have secured this data long before the filing of their application so a forty-eight hour deadline does not seem unreasonable. If these requirements are not satisfied within the allotted time frame that application would be dismissed and a second tentative selectee chosen from among the remaining post card applicants. This process can continue, with a minimal cost to the Commission, until a qualified winner is selected.

A post card lottery would relieve the Commission of that burden at the heart of the current MMDS quagmire, that of having to process every application prior to accepting it for lottery. This inefficient process imposes a substantial drain on the Commissions' already limited resources, resulting in an application backlog and a consequent delay in awarding licenses and getting service to the public. A post card lottery scheme would effect no such suspension while the Commission at the same time, would be assured that its selectees possessed the required resources to meet its construction benchmarks for deployment.

in this proceeding and contends that a tentative selectee's failure to produce proof of firm financial backing or an applicable business or engineering plan within the mandated forty eight hours should be cause for its dismissal. An inadequate presentation on any of these accounts would signal to the Commission that that entity is ill prepared to provide this service to the public in a timely manner, and a new selectee should be drawn.

We assert, however, that the same cause-effect relationship is not necessarily present in an application that meets all of the Commission's standards save a random administrative oversight. USIMTA submits that in the case when all relevant plans and commitments are presented satisfactory to the Commission within the mandated forty eight hours, a tentative selectee whose application contains administrative defects should be allowed an additional forty eight hours in which to rectify these errors. This would preclude the Commission's well intended rules from excluding a worthy entity from serving the public interest as a result of a mere administrative oversight on an otherwise satisfactory application.

E. The Commission should license LMDS by MSAs and RSAs rather than by BTAs.

USIMTA commends the Commission's intent of licensing this new technology by areas that would at once "reinforce the consumer's sense of community, maximize the system's competitive strength, and facilitate license application processing."¹¹ We contend, however, that a fourth variable must be considered as well, ensuring that licensed areas are of a sufficiently

¹¹ Notice, page 13

limited size to be economically feasible for development by the small to mid-sized entity. The Commission in its notice, lends credence to this concern, recognizing that the "costs associated with marketing and providing a new collection of LMDS service to the public may be prohibitive in larger population or geographic areas."¹² By licensing this dynamic technology through the Rand MaNally Basic Trading Areas, the Commission may preclude smaller, innovative entities from fully participating in the service's distribution and development. This is particularly important considering the Commission's ambitious construction benchmarks and coverage requirements.

USIMTA submits that the Commission should license LMDS spectrum by much the same schedule that TV Answer contended it should license Interactive Video and Data Services. TV Answer proposed that the Commission continue to license that service by Metropolitan Service Areas (MSAs) and Rural Service Areas, (RSAs), in blocks according to Broadcast Television's Areas of Dominant Influence, (ADI).

The RSA and MSA are population rather than geographically based, and consequently for a smaller company. This scheme would, at the same time, satisfy the Commission's goals of "fostering the consumers sense of community, the service's strength, and the applications' timely processing."¹³ In addition, the Commission has suggested that it is considering a similar scheme for Personal Communications Services. In short, by adopting an ADI licensing schedule for the

¹² Notice page 13

¹³ Ibid

IVDS, PCS and LMDS technologies, the Commission can ensure a standard for its most innovative and newest technologies.

F.USIMTA suggests that 500 MHZ of this spectrum be set-aside for incumbent MMDS licensees.

USIMTA applauds the Commission's decision to "give significant preferences to applicants

fully realized its competitive potential. Among the problems that this industry has encountered have been its "difficulty in amassing the number of channels necessary to meet subscriber demand and match competitor's offerings, and "discriminatory practices in the sale of video programming".¹⁷ Congress has even recognized this phenomenon as a force behind its recent cable act. In its findings, Congress noted that "[the concentration in the cable industry results] in a reduction of the number of media voices available to consumers."¹⁸ USIMTA contends that the Commission's current proceeding 93-90, will have the further effect of handicapping the fledgling MMDS licensee by delaying its ability to acquire and the needed ITFS channels until the Commission releases its rules. Under this restriction, the MMDS operator will be at an even greater competitive disadvantage.

The initial uses for LMDS technology are likely to be similar to those for which MMDS

USIMTA proposes that to resolve this potential quagmire the Commission should set aside 500 MHz of spectrum in this range for the market's incumbent MMDS operator. This operator will have the option, once it evaluates its competitive position, to either maintain its current MMDS spectrum or to forfeit its MMDS frequency band to a local educational institution and switch to LMDS.

USIMTA asserts that this scheme will have the effect of renewing the precious entrepreneurial spirit by rewarding with government support, those whose goal is to enhance the public's technological standard of living. By subjecting a promising industry to increasing competition, while simultaneously conceding that it has not yet had the chance to develop, would serve to discourage "trail blazers" from further expressing themselves in the telecommunications industry.

G. USIMTA suggests that the Commission lottery 1.5 GHz immediately while holding lotteries for the remaining 500 Mhz in 1 year.

LMDS represents a new paradigm in the telecommunications industry, and the Commission wisely has recognized that while the initial use of the frequency will "most like[ly]...be to provide video service", it is careful not to "limit the use of the band only to video service".²⁰ LMDS represents a significant break from many of the Commission's previous proceedings, as the Commission is licensing a frequency band and not a service. It is crucial therefore that the Commission proceed with caution in this licensing process, as it does not want its well intentioned rules to in any way compromise the dynamic potential of this service.

²⁰ Notice p. 6

USIMTA suggests that to ensure this opportunity to adapt to this dynamic technology, the Commission should license only 1.5 of the available 2 GHz immediately. It should license the remaining 500 MHz after a period of 12 months when the Commission is better able to evaluate the environment in which this technology operates and if necessary, modify the rules accordingly. Of the initial 1.5 Ghz, USIMTA submits, for reasons expressed above, that 500 MHz should be set aside for the market's incumbent MMDS licensee. The remaining 1 GHz should be available to any potential applicant save the incumbent franchised cable operator. If no incumbent MMDS licensee exists, USIMTA suggests that the entire 1.5 Ghz be licensed off consistent with the proceeding restriction. USIMTA suggests this restriction as the Commission and Congress have explicitly declared that franchised cable is a "dominant nationwide video medium"²¹, and should not be strengthened at the expense its competitors. We contend that this scheme should not adversely affect the competitive climate in any particular market as the Commission has noted in its notice "both video and telecommunications services are so well represented in the marketplace that no LMDS operator will have a monopoly or near monopoly position."²²

²¹ S-12, page 3

²² Notice page 11

III. CONCLUSION

USIMTA asserts that the above proposals satisfy the Commission's very legitimate concerns about the LMDS licensing process. We offer a solution that will at once free the Commission's valuable resources from the lengthy procedure of application processing while it ensures that the ultimate lottery winner is capable of timely development and services.

Respectfully submitted,

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